

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by:

STANLEY H. FISCHER

75-13588

B7c
P/S

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA

Respondent-Appellee,

-against-

LOUIS WOLFISH,

Petitioner-Appellant.

BRIEF FOR APPELLANT

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MU 3-0054

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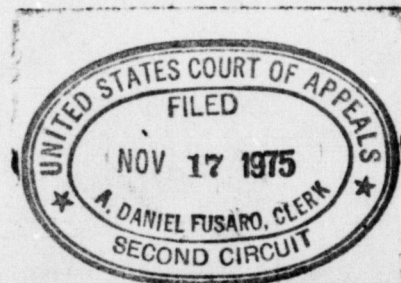


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STATUTES PRESENTED

5 U.S.C. S.551 Definitions

For the purpose of this subchapter -

(1) "agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -

- (A) The Congress;
- (B) The courts of the United States;
- (C) The government of the territories or possessions of the United States;
- (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title-
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them:
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by sections 1738, 1739, 1743 and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former sections 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval of prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for form-

ulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency-

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency-

(A) grant of money, assistance, license, authority, exemption, exception, privilege or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption or exception; or

(C) taking of other action on the application of petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. S.552

S.552. Public information; agency rules, opinions, orders, records and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -

(A) description of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of the paragraph, matter reasonably available to the class of persons affected thereby is deemed

published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency in accordance with published rules, shall make available for public inspection and copying-

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete indentifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instructions. However, in each case for the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if-

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the

complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case, the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency have more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are-

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of any agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than as agency in litigation with the agency. ;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

EAGLE-A

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ISSUE PRESENTED

1. Should an administrative agency be permitted to avoid the mandate of 5 U.S.C. 552 by depositing the requested records with an agency which is exempt under 5 U.S.C. 551.

STATEMENT OF THE CASE

The appellant was tried on criminal charges of mail fraud before the Hon. Lawrence W. Pierce. During the course of the trial, the government submitted to the court certain documents which the court ordered sealed as Court Exhibit 4 and which were deposited in the safes of the Southern District of New York and of the United States Court of Appeals for the Second Circuit. The documents were never revealed to appellant. The court stated that they did not constitute Brady or Jenks material. The appellant believes that the documents may have been obtained from the State Department or the Postal Service, but in any event from an agency of the United States Government susceptible to 5 U.S.C. 551., and transmitted to the Department of Justice which then submitted them to the Court which sealed them. Since the original documents are no longer within the originating agency, an application to the originating agency or the conduit agency, the Department of Justice, under 5 U.S.C. 551 would be fruitless. The appellant made, pro se, an application to the Court by letter document. The application was denied by endorsement order by the Hon. Lawrence W. Pierce on the 15th day of September, 1975.

Said order dismissed the petition on grounds that 5 U.S.C. 551 (1)
(b) specifically excludes the court from compliance with 5 U.S.C.
552

Appeal is taken from the order dismissing the
petition.

EAGLE-A

TYPE-ERASE

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POINT

AN ADMINISTRATIVE AGENCY SHOULD NOT BE
PERMITTED TO AVOID THE MANDATE OF 5 U.S.C.
552 BY DEPOSITING THE REQUESTED RECORDS
WITH AN EXEMPT AGENCY.

Under 5 U.S.C. 552 (c) any information not expressly authorized to be withheld under section 5 U.S.C. 552 is to be available to the public. Since the information has never been shown appellant, appellant is not aware whether the specific exemptions of 5 U.S.C. 552 (4) (b) apply. However, the Court below never reached the issue, having decided that a court, by its very nature was exempt under 5 U.S.C. 551. No consideration nor hearing was had to determine if the court was just a depository of information to "bury the body", so to speak; and to thus avoid the disclosure mandated by 5 U.S.C. 552.

If the court safe became the repository to avoid compliance, it so doing flies directly into the intent of Congress to open the myriad, unjustified secrets of government to the public.

As the Report to the Senate no. 813 (October 4, 1965) from the committee on the Judiciary stated, in support of amendment of the then existing law (p5):

It is the conclusion of the committee that the present section 3 of the administrative procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Indeed it has had precisely the opposite effect; it is cited as statutory authority for the withholding of virtually any piece of information that an official or agency does not wish to disclose.

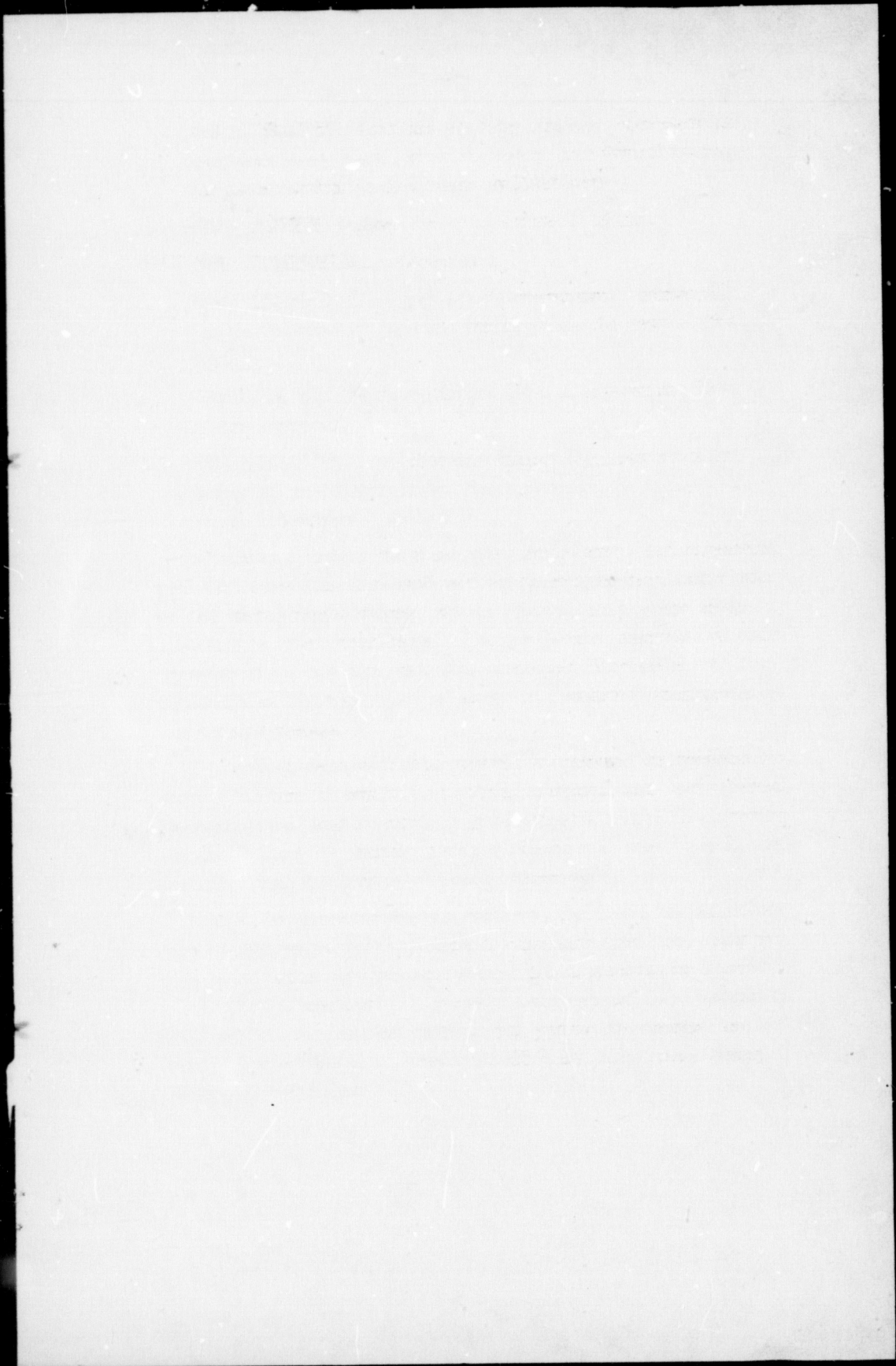
Under the present section 3 any government official can under color of law withhold almost anything from a citizen under the vague standards--or more precisely, lack of standard in Section 3. It would require almost no effort for any official to think up a reason why a piece of information should be withheld (1) because it was in the "public interest", or (2) for cause found, or (3) that the person making the request was not properly and directly concerned." and, even if his reason had not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available.

and

Report to the house of representatives No. 1497 89th Congress, May 8, 1966, from the Committee on Government Operation (p5):

"Improper denials occur again and again for more than 10 years through the administration of both the political parties, case after case of improper withholding, based upon 5 U.S.C. 1002 has been documented. The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosure in such cases."

If the information at issue comes from any agency which would be required to conform to 5 U.S.C. 55 and the information is not exempt under 5 U.S.C. 552, then this court should mandate disclosure as the report to the Senate, supra, said(p. 10).



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Respondent-Appellee

~~DEFENDANT~~

against

LOUIS WOLFISH,

Petitioner-Appellant

~~DEFEKANT~~

Index No.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

The undersigned being duly sworn, deposes and says:

*Deponent is not a party to the action, is over 18 years of age and resides at Jersey City,
New Jersey*

*That on the 17th day of November, 1975 deponent served the annexed
Appendix and Brief for Appellant
on THOMAS CAHILL, Acting United States Attorney
attorney(s) for Respondent-Appellee
in this action at United States Courthouse Foley Square, New York
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.*

Sworn to before me

this 17th day of November

Alan L. Friedman

ALAN L. FRIEDMAN
NOTARY PUBLIC, State of New York
No. 30-6410391

Qualified in Nassau County
Commission Expires March 30, 1977

1975

Debra Bokuniewicz
Debra Bokuniewicz

The name signed must be printed beneath

Index No.

against

Plaintiff

Defendant

**ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF

SS.:

*The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for*

That on the day of 19 deponent served the annexed

*on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.*

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this day of 19

The name signed must be printed beneath

Attorney at Law

EAGLE-A
TYPE-ERASE

"A government by secrecy benefits no one.
It injures the people it seeks to serve, it injures
it's own integrity and operation.
It breeds mistrust, dampens the fervor of it's citizens,
and mocks their loyalty.
For these reasons the committee reports the bill with the
recommendation that it be adopted as amended.

The court should not become the cemetary to
avoid compliance with 5 U.S.C. 552. Surely the intent of Con=
gress was that internal court documents would be exempt from
disclosure but not other agency documents deposited for safe=
keeping.

CONCLUSION

THIS COURT SHOULD DIRECT THAT A HEARING
BE HELD TO DETERMINE WHETHER THE DOCUMENTS
ARE EXCLUDED UNDER 5 U.S.C. 552 OR WHETHER
THEY SHOULD BE DELIVERED TO DEFENDANT.

Respectfully submitted,

STANLEY H. FISCHER
Attorney for Appellant,
LOUIS WOLFISH
2 Park Avenue
New York, N. Y. 10016